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No. 97 • 554 SEP 29 1997

IN THE OFFICE OF THE CLERK

Supreme Court of the United States

October Term, 1997

JAMES E. TUCKER,

Petitioner,

against

MARILYN OUTWATER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Has Petitioner been deprived of due process where a Judge of a Court of limited jurisdiction exercises jurisdiction without having a warrant or other legal process within her jurisdiction.

PARTIES

The Parties to the proceeding in the United States Court of Appeals for the Second Circuit were:

1. James E. Tucker, Plaintiff.

2. Marilyn Outwater, Defendant.

3. The County of Jefferson, *et al.*, Defendants.

The County of Jefferson, *et al.*, are not interested in this proceeding.

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Petitioner James E. Tucker ("Plaintiff) respectfully requests that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is published at 118 F.3d 930 (1997).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit ("Court of Appeals") was entered on July 7, 1997.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall...be deprived of life, liberty or property, without due process of law;...."

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to...be informed of the nature and cause of the accusation;...."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "All persons born or naturalized in the United States...are citizens of the Unites States and of the state wherein they reside. No state shall make or enforce any law

which shall abridge the privileges or immunities of citizens...nor shall any state deprive any person of life, liberty or property without due process of law;...."

STATEMENT OF THE CASE

The question in this case is whether or not a judge sitting on a Court of limited jurisdiction is entitled to absolute immunity from damages where the judge exercised jurisdiction over the Plaintiff when neither she nor the arresting officers had in their possession a warrant, ticket or other supporting papers or in fact ever saw such documents. The Court of Appeals, Second Circuit found that the judge had absolute immunity from damages by virtue of possessing subject matter jurisdiction pursuant to §120.90(3) of the New York Criminal Procedure Law.

BACKGROUND

Plaintiff James Tucker filed this action pursuant to 42 U.S.C. §1983 and the Fourteenth Amendment against two counties, several law enforcement officers, and Marilyn Outwater, a Town Justice in the Town of Watertown, Jefferson County, New York. Plaintiff seeks damages and attorneys' fees for his false arrest, malicious prosecution, and illegal confinement.

In the early morning hours of December 4, 1993, in the Town of Italy, Yates County, New York, Plaintiff James E. Tucker was asleep on the passenger seat of a pickup truck when the driver, Douglas VanAmburg, lost control of the truck, allowing it to strike a culvert causing serious physical injuries to the Plaintiff. VanAmburg admitted to the Yates County Sheriff officers at the scene of the accident that he was driving the truck. As a result he was issued tickets charging him with driving while intoxicated and failure to keep right. At some

point after December 4, 1993 and before March 16, 1994, the tickets issued to Mr. VanAmburg were dismissed at the request of the sheriff's deputy.

On March 16, 1994, more than three months after the accident, the same officer who had issued the original ticket to VanAmburg filed information in the Town Court of Italy charging that Plaintiff was under the influence of alcohol and had driven the truck which struck the culvert thereby injuring himself. That day the Town Justice in the Town of Italy issued a warrant for Plaintiff's arrest.

On March 18, 1994, between 3:00 a.m. and 5:00 a.m. officers of the Jefferson County Sheriff's Department arrested Plaintiff at his home in the Town of Evans Mills where he had lived for more than a quarter of a century and which County is located more than 100 miles away from Yates County. The Jefferson County Sheriff's did not have a warrant for Plaintiff's arrest in their possession nor did they have any other accusatory instrument at the time that they arrested the Plaintiff or at any time thereafter while in Plaintiff's presence. Without consulting plaintiff the arresting officers transported Plaintiff 25 miles to Justice Marilyn Outwater's Town of Watertown Court, apparently by prearrangement. Justice Outwater did not have a warrant, ticket or other supporting papers. Plaintiff asked to see the warrant and any accusatory instrument and Justice Outwater denied Plaintiff's request without disclosing that she did not have any documents. Justice Outwater set bail at $800.

On March 25, 1994, Plaintiff traveled to Justice Outwater's Court and repeated his request for copies of the warrant, ticket and other supporting papers. Justice Outwater again refused although Plaintiff was furnished with an illegible copy of a ticket accusing him of Driving While Intoxicated.

On June 7, 1995, Plaintiff commenced an action alleging that Justice Outwater, the arresting officers, Yates County officers and others had violated rights guaranteed to him by §1983 and the Fourteenth Amendment. Justice Outwater moved to dismiss on the grounds of judicial immunity. The United States District Court denied the motion to dismiss. The District Court held that Justice Outwater had acted in the clear absence of all jurisdiction, and thus was not entitled to judicial immunity. Justice Outwater then appealed to the United States Court of Appeals for the Second Circuit and in a decision filed July 7, 1997 found that New York Criminal Procedure Law §120.90(3) authorized Justice Outwater to exercise jurisdiction over the Plaintiff for the purpose of arraigning him and fixing and enforcing a bail because she sat on a local criminal court in the county of arrest even though that county was neither the county in which the warrant was returnable nor an adjoining county. By reason of that decision the judgment of the District Court was reversed and the case was remanded to the District Court for further proceedings.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW SUPPORTS THE PROPOSITION THAT AN INDIVIDUAL MAY BE DEPRIVED OF LIBERTY BASED ON HEARSAY THAT A WARRANT FOR THE INDIVIDUAL'S ARREST HAS BEEN ISSUED.

On March 18, 1994 Plaintiff James Tucker was asleep at his home when two Jefferson County Sheriff's Deputies awakened him, arrested him and took him in his night clothes to be arraigned before a judge of a Town of Watertown, New York

Justice Court. Neither the Deputies nor the Judge had a warrant, information or other document nor had they seen one. The Sheriff's Deputies were advised by their dispatcher at the Jefferson County Sheriff's Office in the City of Watertown that a Driving While Intoxicated warrant for Plaintiff's arrest was being sent by telefax. At the time of the arrest near the Village of Evans Mills, New York nothing had arrived from Yates County. Supposedly the dispatcher at the Jefferson County Sheriff's office had received a message from the dispatcher at the Yates County Sheriff's office that a telefax of a warrant would be sent.

Based on that fact circumstance the United States District Court reviewed New York Criminal Procedure Law Section 120.90(3) which provides that:

> Upon arresting a defendant for an offense other than a felony pursuant to a warrant of arrest in a county other than the one in which the warrant is returnable or one adjoining it, a police officer or peace officer appointed by the state university, if he be one to whom the warrant is addressed, must inform the defendant that he has a right to appear before a local criminal court of the county of arrest for the purpose of being released on is own recognizance or having bail fixed. If the defendant does not desire to avail himself of such right, the officer must request him to endorse such fact upon the warrant, and upon such endorsement the officer must without unnecessary delay bring him before the court in which the warrant is returnable. If the defendant does desire to avail himself of such right, or if he refuses to make the aforementioned endorsement, the officer must without unnecessary delay bring him before a local criminal court of the county of arrest. Such court must release

> the defendant on his own recognizance or fix bail for his appearance on a specified date in the court in which the warrant is returnable. If the defendant is in default of bail, the officer must without unnecessary delay bring him before the court in which the warrant is returnable.

The United States District Court decided that the Defendant could not rely on that section to support her subject matter jurisdiction over the Plaintiff because neither the Judge nor the Sheriff's Deputies had in their possession a warrant or other document. Furthermore the District Court pointed out that even if Defendant Outwater had a warrant in her possession she knew that the Plaintiff apparently had not seen it and had not been given the choice of arraignment forum. Thus the prerequisites for jurisdiction were not met. In conclusion the District Court found that Defendant Outwater acted in the clear absence of jurisdiction.

The Court of Appeals in reviewing *Stump v. Sparkman,* 435 U.S. 349, 356 (1978) found that the Judge's jurisdiction must be construed broadly and that a two-part test was required to determine whether absolute immunity should be granted. Using *Stump* and *Maestri v. Jutkofsky*, 860 F.2d 50 (2d Cir. 1988) the Court of Appeals found a sufficient distinction to rule that Defendant Outwater's actions were in excess of her jurisdiction and not in the clear absence of it. The Court of Appeals found that NYCPL Section 120.90(3) authorized Defendant Outwater to exercise jurisdiction.

In the United States Court of Appeals Decision at Appendix A herein, footnote 2, the Judge's claim that Plaintiff failed to raise the argument that Justice Outwater had no subject matter jurisdiction. That is not correct. The very point raised by the Plaintiff at both the District Court and Court of Appeals level

was that without a warrant Justice Outwater had no subject matter jurisdiction.

The Court of Appeals ruled that the provisions of NYCPL Section 120.70(2) which states as follows:

> A warrant of arrest issued by a city court, a town court or a village court may be executed: (a) In the county of issuance or in any adjoining county; or (b) Anywhere else in the state upon the written endorsement thereon of a local criminal court of the county in which the arrest is to be made. When so endorsed, the warrant is deemed the process of the endorsing court as well as that of the issuing court.

did not help Plaintiff even though the warrant of arrest issued in Yates County required an endorsement by a Jefferson County criminal court. The Court of Appeals took the position that this requirement fell within the scope of the "manner and extent to which jurisdiction shall be exercised.", quoting *Stump*.

The Court of Appeals ignores the requirements of NYCPL Section 110.10 which reads in pertinent part as follows:

> 1. After a criminal action has been commenced in a local criminal court by the filing of an accusatory instrument therewith, a defendant who has not been arraigned in the action and has not come under the control of the court may under certain circumstances be compelled or required to appear for arraignment upon such accusatory instrument by: (a) The issuance and execution of a warrant of arrest, as provided in article one hundred twenty; or ...

> 2. Although no criminal action against a person has been commenced in any court, he may under certain circumstances be compelled or required to appear in a local criminal court for arraignment upon an accusatory instrument to be filed therewith at or before the time of his appearance by: (a) An arrest made without a warrant, as provided in article one hundred forty; or....

Petitioner believes his fact situation in which the Judge and arresting officers had no document and where the Plaintiff is brought to court on the strength of an apparent radio message to a sheriff's patrol car does not rise to the level where it should receive *Stump* two-part test consideration. Jurisdiction is clearly absent. The Court of Appeals' decision is that NYCPL Section 120.90(3) confers jurisdiction for the purpose of an arraignment, fixing and enforcing bail and that Defendant Outwater's failure to have a warrant in her hands; the failure of the arresting officers to have any warrant or other legal process and the failure of a local criminal court in the county of arrest to endorse the warrant are simply facts which concern the "manner and extent in which jurisdiction shall be exercised" *Stump*. Therefore the Court of Appeals claimed that Judge Outwater simply acted in excess of her jurisdiction. That rationale is fundamentally flawed and is unconstitutional. The Plaintiff was never informed of his right to appear before a Yates County or Jefferson County, New York local criminal court. He was not afforded any rights.

The section of New York State law which requires that a warrant issued by a local criminal court for execution in a non-adjoining county must contain the written endorsement of the local criminal court of the county in which the defendant is taken into custody is NYCPL Section 530.70(1). It reads as follows:

> A bench warrant issued by a superior court, by a district court, by the New York City criminal court or by a superior court judge sitting as a local criminal court may be executed anywhere in the state. A bench warrant issued by a city court, a town court or a village court may be executed in the county of issuance or any adjoining county; and it may be executed anywhere else in the state upon the written endorsement thereon of a local criminal court of the county in which the defendant is to be taken into custody. When so endorsed, the warrant is deemed the process of the endorsing court as well as that of the issuing court.

Since Defendant Outwater had no warrant to endorse, the warrant could not be considered the process of the Jefferson County Town Court. Petitioner argues the rule in *Maestri* mandate an opposite conclusion than reached by the Court of Appeals. We cannot look to the matter of the act itself, inquiring whether or not Defendant Outwater's actions were a function normally performed by a judge of limited jurisdiction. We must look past the word "function" and decide whether or not our society wants to have long distance arrests made by a telephone or teletype request, or does our constitution require more. *Hunt v. Bennett*, 17 F.3d 1263, reh.den., 115 S.Ct. 107 (10th Cir. 1994).

CONCLUSION

The issue presented is of exceptional importance to the preservation of our liberty. The Court of Appeals has misconstrued the question by addressing whether or not all procedural requirements were met. Once the Court of Appeals limited itself to discussing the procedural requirements, it missed the fundamental issue. The real question is whether or not a

sheriff's deputy at one end of New York State can arrest a citizen at the other end of New York State with a telephone or teletype message and without more, cause a liberty to be retrained. If so, the rule of law is that a judge in a court of limited jurisdiction is always entitled to absolute immunity under all circumstances. Bail can be set for anyone at any time by having a person arrested and brought before a judge without any warrant or accusatory instrument.

By reason of the foregoing the Plaintiff respectfully requests that his Petition for Writ of Certiorari be granted.

Respectfully submitted.

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APPENDIX A—Opinion of the United States Court of Appeals For the Second Circuit filed July 7, 1997

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 3440—August Term 1996

Argued: April 28, 1997 Decided: July 7, 1997)

Docket No. 96-9251

JAMES E. TUCKER,

Plaintiff-Appellee,

—v.—

MARILYN OUTWATER,

Defendant-Appellant,

—and—

THE COUNTY OF JEFFERSON, *et al.*,

Defendants.

Before:

KEARSE, *Circuit Judge*, CALABRESI, *Circuit Judge*, and OBERDORFER, *District Judge*.*

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* The Honorable Louis F. Oberdorfer, of the United States District Court for the District of Columbia, sitting by designation.

Appeal from the August 22, 1996 judgment of the United States District Court for the Northern District of New York (Thomas J. McAvoy, Chief Judge), holding that New York Town Justice is not entitled to judicial immunity in damage action against her and denying motion to dismiss the complaint.

Reversed and remanded.

ROBERT J. LEADER, Governeur, New York (Case, Leader & Brownell, L.L.P., Governeur, New York, on the brief), *for plaintiff-appellee.*

TIMOTHY J. PERRY, Syracuse, New York (Sugarman, Wallace, Manheim & Schoenwald, Syracuse, New York, on the brief), *for defendant-appellant.*

OBERDORFER, *District Judge*:

Town Justice Marilyn Outwater appeals from the August 22, 1996 judgment of the United States District Court for the Northern District of New York, denying her motion to dismiss the complaint. The district court held that Outwater was not entitled to judicial immunity because she acted in the clear absence of all jurisdiction. This Court concludes that Outwater did not act in clear absence of all subject matter jurisdiction and enjoys immunity from plaintiff's claim for damages. The judgment of the district court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

I.

Background

Plaintiff James Tucker filed this action pursuant to 42 U.S.C. § 1983 and the Fourteenth Amendment against two counties, several law enforcement officers, and Marilyn Outwater, a Town Justice in the Town of Watertown, Jefferson County, New York. Plaintiff seeks damages and attorneys' fees for his alleged false arrest, malicious prosecution, and illegal confinement. On this appeal from the denial of a motion to dismiss, we accept the facts alleged in the complaint, plaintiff's supporting affidavits and interrogatory answers, and reasonable inferences drawn therefrom in the light most favorable to the plaintiff.

In the Town of Italy, Yates County, New York, on the night of December 4, 1993, plaintiff Tucker was asleep in the passenger side of a pickup truck when the driver, Douglas VanAmburg, lost control of the truck, after which it struck a culvert causing serious injuries to plaintiff. VanAmburg originally admitted to Yates County officers at the scene of the accident that he was driving the truck. Thereupon, one of the officers issued tickets charging VanAmburg with driving while intoxicated and failure to keep right. At some time between December 4, 1993 and March 1994, the tickets issued to VanAmburg were canceled.

For reasons unexplained on the record, on March 16, 1994, over three months after the accident, the same officer who had ticketed VanAmburg filed an information in the Town Court of Italy charging that it was plaintiff who was under the influence of alcohol and who had driven the truck into the culvert, injuring himself.

That same day, Justice Duane Shay of the Town Court of Italy issued a warrant for plaintiff's arrest.

On March 18, 1994, between 3:00 a.m. and 5:00 a.m., officers of the Yates and Jefferson County Sheriffs' Departments arrested plaintiff at his home in the Town of Evans Mills in Jefferson County, New York, some 100 miles away from Yates County. The officers transported him to the Town of Watertown, also in Jefferson County. Although Justice Shay's warrant for plaintiff's arrest was extant, the officers were not in possession of it or any other accusatory instrument at the time they arrested plaintiff. By prearrangement, the arresting officers promptly brought plaintiff before Justice Outwater at her town court in Watertown. After denying plaintiff's request to see the warrant and any accusatory instruments (and without disclosing that she did not have them at hand), Justice Outwater set bail at $800 and remanded plaintiff to jail when he failed to post bail.

Seven days later, on March 25, 1994, plaintiff was again brought before Justice Outwater. He repeated his request for copies of the warrant, ticket, and other supporting papers. Instead, plaintiff was furnished with illegible copies of DWI tickets. After some undetermined time, plaintiff was released. On March 4, 1995, a jury in the Town of Italy, Yates County, found him not guilty.

On June 7, 1995, plaintiff commenced this action, alleging that Justice Outwater, the arresting officers, and others had violated rights guaranteed to him by section 1983 and the Fourteenth Amendment. Justice Outwater moved to dismiss on the ground of judicial immunity. The district court, relying upon *Maestri v. Jutkofsky*, 860 F.2d 50 (2d Cir. 1988), denied the motion to dismiss.

The Court held that Outwater had acted in the clear absence of all jurisdiction, and thus was not entitled to judicial immunity. The ultimate legal issue presented by this appeal is whether Justice Outwater is entitled to absolute immunity from damages by virtue of possessing subject matter jurisdiction over the preliminary proceedings that she conducted, pursuant to section 120.90(3) of the New York Criminal Procedure Law.[1]

II.

Analysis

A. *Applicable Law*

Since the seventeenth century, the common law has immunized judges from damage claims arising out of their judicial acts. *See, e.g., Floyd v. Barker*, 77 Eng.

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[1] Section 120.90(3) provides in relevant part that:

> Upon arresting a defendant for an offense other than a felony pursuant to a warrant of arrest in a county other than the one in which the warrant is returnable or one adjoining it, a police officer or peace officer . . . if he be one to whom the warrant is addressed, must inform the defendant that he has a right to appear before a local criminal court of the *county of arrest* for the purpose of being released on his own recognizance or having bail fixed. If the defendant does not desire to avail himself of such right, the officer must request him to endorse such fact upon the warrant, and upon such endorsement the officer must without unnecessary delay bring him before *the court in which the warrant is returnable.* If the defendant does desire to avail himself of such right, or if he refuses to make the aforementioned endorsement, the officer must without unnecessary delay bring him before *a local criminal court of the county of arrest.* Such court must release the defendant on his own recognizance or *fix bail* for his appearance on a specified date *in the court in which the warrant is returnable.* If the defendant is in default of bail, the officer must without unnecessary delay bring him before *the court in which the warrant is returnable.*

(emphases added).

Rep. 1305 (Star Chamber 1607) (judges of courts of record). This doctrine was embraced by the Supreme Court in 1872 in *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872). *Bradley* established as "a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself." *Id.* at 347. "Because 'some of the most difficult and embarrassing questions which a judicial officer is called upon to consider and determine relate to his jurisdiction . . . ,' the scope of the judge's jurisdiction must be construed broadly when the issue is the immunity of the judge." *Stump v. Sparkman*, 435 U.S. 349, 356 (1978) (quoting *Bradley*, 80 U.S. at 352). The cloak of immunity is not pierced by allegations of bad faith or malice, *Pierson v. Ray*, 386 U.S. 547, 554 (1967), even though "unfairness and injustice to a litigant may result on occasion." *Mireles v. Waco*, 502 U.S. 9, 9 (1991). The principle of judicial immunity recognizes that a judge may err. But "it is better for a judge when exercising the discretion inherent in his judicial power 'to risk some error and possible injury from such error than not to decide or act at all.' " *Green v. Maraio*, 722 F.2d 1013, 1017 (2d Cir. 1983) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 242 (1974)). The Supreme Court has repeatedly reaffirmed these principles. *See, e.g.*, *Mireles*, 502 U.S. at 9, *Forrester v. White*, 484 U.S. 219 (1988); *Cleavinger v. Saxner*, 474 U.S. 193 (1985); *Dennis v. Sparks*, 449 U.S. 24 (1980); *Supreme Court of Virginia v. Consumers Union of United States, Inc.*, 446 U.S. 719 (1980); *Butz v. Economou*, 438 U.S. 478 (1978); *Stump*, 435 U.S. at 349. The Supreme Court has specifically applied the doctrine of judicial immunity to actions

brought pursuant to 42 U.S.C. § 1983. *See Pierson*, 386 U.S. at 547.

In *Stump*, the Court developed a two-part test for determining whether a judge is entitled to absolute immunity from damage claims. *See* 435 U.S. at 360. First, "[a] judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the '*clear absence of all jurisdiction.*'" *Id.* at 356-57 (emphasis added) (quoting *Bradley*, 80 U.S. at 351). Second, a judge is immune only for actions performed in his judicial capacity. *Id.* at 360-63; *see also Gregory v. Thompson*, 500 F.2d 59, 62 (9th Cir. 1974) (finding no immunity for assaulting litigant).

Plaintiff does not argue that Justice Outwater acted in a non-judicial capacity. That requirement is not at issue here. In any event, Justice Outwater's arraignment of plaintiff and setting of bail were plainly judicial acts. Plaintiff does argue, however, and persuaded the district court, that Justice Outwater acted in the clear absence of all jurisdiction. This Court reviews that conclusion of law *de novo*.

Stump guides the determination of whether a judge acts in the clear absence of all jurisdiction or merely in excess of jurisdiction. In *Stump*, a mother petitioned an Indiana Circuit Court for authority to have her "somewhat retarded" fifteen-year old daughter sterilized. Circuit Judge Stump approved the petition the same day in an *ex parte* proceeding without a hearing and without notice to the daughter or appointment of a guardian *ad litem*. The daughter was sterilized, having been told that she was having her appendix removed. Approximately

two years later, the daughter learned that she had been sterilized. She sued, among others, Judge Stump. The district court dismissed the case against the judge on the ground that he was entitled to absolute immunity. The Court of Appeals reversed, holding that Judge Stump had acted in the clear absence of all jurisdiction. The Court of Appeals also held that the judge had forfeited whatever jurisdiction he had "because of his failure to comply with elementary principles of procedural due process." *Stump*, 435 U.S. at 355. The Supreme Court reversed, holding that Stump was entitled to judicial immunity. The Court found that Stump had acted within the broad jurisdictional grant conferred upon his court. Furthermore, the Court found that the Court of Appeals had "misconceive[d] the doctrine of judicial immunity" in holding that the judge's failure to comply with elementary principles of due process precluded an immunity defense of his action. *Id.* at 359. The Court stated:

> A judge is absolutely immune from liability for his judicial acts even if his exercise of authority is flawed by the commission of grave procedural errors. The Court made this point clear in *Bradley*, where it stated: "[T]his erroneous manner in which [the court's] jurisdiction was exercised, however it may have affected the validity of the act, did not make the act any less a judicial act; nor did it render the defendant liable to answer in damages for it at the suit of the plaintiff, as though the court had proceeded without having any jurisdiction whatever . . . ."

Id. (internal citations omitted).

By reference to an illustration from *Bradley*, *Stump* further distinguished between an "excess of jurisdiction"

and "the clear absence of all jurisdiction over the subject matter."

> Where there is clearly no jurisdiction over the subject-matter any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. *But where jurisdiction over the subject-matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case*, although upon the correctness of his determination in these particulars the validity of his judgments may depend.

Id. at 356 n.6 (citing *Bradley*, 80 U.S. at 351). *Bradley* provided an example:

> Thus, if a probate court, invested only with authority over wills and the settlement of estates of deceased persons, should proceed to try parties for public offences, jurisdiction over the subject of offences being entirely wanting in the court, and this being necessarily known to its judge, his commission would afford no protection to him in the exercise of usurped authority. But if on the other hand a judge of a criminal court, invested with general criminal jurisdiction over offences committed within a certain district, should hold a particular act to be a public offence, which is not by the law made an offence, and proceed to the arrest and trial of a party charged with such act, or should sentence a party convicted to a greater punishment than that authorized by the law upon its proper construction,

> no personal liability to civil action for such acts would attach to the judge, although those acts would be in excess of his jurisdiction, or of the jurisdiction of the court held by him, for these are particulars for his judicial consideration, whenever his general jurisdiction over the subject-matter is invoked.

See 80 U.S. at 352.

In *Maestri v. Jutkofsky*, 860 F.2d 50 (2d Cir. 1988), the case relied upon by the district court here to reject the immunity defense, we elaborated on the distinction between a judicial act in excess of jurisdiction and an act in the clear absence of jurisdiction:

> Because scrutiny of a judge's state of mind would hinder the adjudicatory process in the very manner that the judicial immunity doctrine is designed to prevent, a judge will be denied immunity only where it appears, first, that the judge acted in the clear absence of jurisdiction, and second, that the judge must have known that he or she was acting in the clear absence of jurisdiction. This test, composed both of an objective element—that jurisdiction is clearly absent, *i.e.*, that no reasonable judge would have thought jurisdiction proper—and of a subjective element—that the judge whose actions are questioned actually knew or must have known of the jurisdictional defect—protects judicial acts from hindsight examination while permitting redress in more egregious cases, such as where a judge knowingly acts outside his territorial jurisdiction.

Id. at 53.

Maestri considered the immunity defense raised by Joseph Jutkofsky, the Town Justice of the Town of Taghkanic, New York. Justice Jutkofsky issued a warrant

for the arrest of plaintiffs Maestri and Zook for their conduct in the Town of Germantown, New York. Maestri and Zook sued Justice Jutkofsky, among others, alleging deprivation of their rights pursuant to 42 U.S.C. § 1983. The district court dismissed the suit against Justice Jutkofsky on the ground of judicial immunity. This Court reversed, holding that Justice Jutkofsky acted in the clear absence of all jurisdiction and must have known that he was acting in the clear absence of all jurisdiction.

Maestri turned on the requirements of New York Criminal Procedure Law that (i) a complaint must be filed in the town in which the offense was committed, *see* N.Y. Crim. Pro. Law § 100.55(4) (McKinney 1992); and (ii) a warrant for arrest must be issued only by the court in which the complaint was filed, *id.* at § 120.30(1). Alternatively, if a town justice of the town in which the offense occurred were not available to receive a complaint and issue an arrest warrant, the complaint may be filed with the town court of any adjoining town within the same county. *Id.* at § 120.30(2). The offense in *Maestri* was allegedly committed in the Town of Germantown. Section 100.55(4) required, therefore, that the complaint be filed in the town court of the Town of Germantown. In addition, only that court had jurisdiction to issue a warrant pursuant to that complaint. In *Maestri*, however, the complaint was filed in the town court for the Town of Taghkanic. Town Justice Jutkofsky issued a warrant pursuant to that complaint, even though the offense was allegedly committed in the Town of Germantown. Finally, "[u]nder no circumstance" could section 120.30(2) confer jurisdiction. *See Maestri*, 860 F.2d at 52. The Town of Germantown, the site of the offense, and the Town of Taghkanic, where Justice Jutkofsky sat, although in the same county, do not adjoin one another.

See Maestri, 860 F.2d at 52. The law created in Justice Jutkofsky, where he sat, no jurisdiction to issue any warrant to arrest Maestri and Zook, whose alleged crime occurred neither there nor in an adjoining town. Therefore, Justice Jutkofsky was not entitled to judicial immunity.

The facts of *Maestri* are distinguishable from the facts in the instant case. Here, unlike Justice Jutkofsky, Justice Outwater of Watertown, Jefferson County (the county of plaintiff's arrest) neither received the original complaint nor issued the arrest warrant. That was the work of Justice Shay, acting several days earlier in the town of Italy, Yates County (the site of the alleged offense) as he was authorized to do by N.Y. Crim. Pro. Law § 100.55(4). Rather, Justice Outwater merely arraigned defendant, set bail, and remanded him when he failed to make bail as she was authorized to do by N.Y. Crim. Pro. Law § 120.90(3).

Section 120.90(3) provides that where, as here, a defendant is arrested in neither the county in which the arrest warrant is returnable nor the county that adjoins that county, the defendant may elect to appear before a local criminal court in the county of arrest. The arrest warrant was issued by, and returnable to, the town court of the Town of Italy in Yates County, New York. *See* N.Y. Crim. Pro. Law § 120.30 (McKinney 1992). Plaintiff was arrested in Jefferson County, New York. Justice Outwater's court, in the Town of Watertown, is also located in Jefferson County. That court is also a "local criminal court." *See id.* at § 10.10(3). Finally, this court takes judicial notice of the fact that Jefferson County and Yates County do not adjoin and, in fact, are separated by over 100 miles and several large lakes. In sum, Section 120.90(3) authorized Justice Outwater to exer-

cise jurisdiction over plaintiff for the purpose of arraigning[2] him and fixing and enforcing bail because she sits on a local criminal court (Town of Watertown) in the county of arrest (Jefferson County), which was neither the county in which the warrant was returnable (Yates County) nor an adjoining county.

Plaintiff argues, nevertheless, that even if such jurisdiction exists pursuant section 120.90(3), Justice Outwater is not entitled to judicial immunity because she did not comply with the procedural requirements of section 120.90(3) or section 120.70(2). Section 120.70(2) states that when a warrant is executed in neither the county of issuance nor an adjoining county, it must be endorsed by a local criminal court of the county of arrest. Section 120.90(3) states that the defendant must be informed of his right to appear before a local criminal court of the county of arrest. If the defendant elects to appear before a local criminal court in that county, he must be taken there for that purpose. If the defendant does not wish to exercise his right to appear before a local criminal court in the county of arrest, the arresting officer must ensure that the defendant endorse that fact

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[2] We do not address plaintiff's argument that while section 120.90(3) may have conferred subject matter jurisdiction to set bail and release plaintiff on his own recognizance, it did not confer subject matter jurisdiction for Justice Outwater to arraign plaintiff. Plaintiff failed to raise this argument before the district court. As a general matter, "a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). This general rule "may be overcome only when necessary to avoid manifest injustice, or where there is some extraordinary need to consider appellant's claim." *Amalgamated Clothing and Textile Worker's Union v. Wal-Mart Stores*, 54 F.3d 69, 73 (2d Cir. 1995) (internal citations and quotations omitted). Since no apparent consequence flowed from the arraignment, and plaintiff has not made a showing of manifest injustice or extraordinary need for us to consider the matter, the general rule precludes consideration of any claim plaintiff might have growing out of his arraignment *per se*.

upon the warrant for arrest. Otherwise, the officer must bring the defendant before a local criminal court in the county of arrest. *Id.* at § 120.90(3).

Plaintiff is correct in asserting that there is no evidence in the record of either of these endorsements. Such omissions, however, concern the "manner and extent in which jurisdiction shall be exercised." *Stump*, 435 U.S. at 356 n.6. By asserting jurisdiction without complying with the formal requirements of sections 120.90(3) and 120.70(2), Justice Outwater may well have acted in excess of her jurisdiction. But her mistakes are precisely the kind of "procedural errors," albeit "grave," that do not deprive a judge of subject matter jurisdiction—or judicial immunity. *Id.* at 359.

This conclusion comports with *Maestri*. A judge will be denied immunity for damages where he (i) acts in the clear absence of all jurisdiction; and (ii) knew or must have known that he was acting in such a manner. The first element of the test is an "objective" inquiry as to whether "jurisdiction is clearly absent, *i.e*, . . . no reasonable person would have thought jurisdiction proper." *Maestri*, 860 F.2d at 53. The second element of the test is a subjective inquiry as to whether "the judge whose actions are questioned actually knew or must have known" that he was acting in the clear absence of all jurisdiction. *Id.* In this case, plaintiff offered the affidavits of two New York town justices to the effect that no reasonable judge would have done what Justice Outwater did. Nonetheless, it cannot be said consistently with Supreme Court jurisprudence that "jurisdiction is clearly absent" where, as here, "jurisdiction over the subject-matter is invested by law in the judge." *Stump*, 435 U.S. at 356 n.6. Since consideration of *Maestri's* first objective element does not deprive Justice Out-

water of immunity, this court need not consider what she knew or must have known in exercising jurisdiction over plaintiff.

Today's decision is consistent with earlier immunity rulings. *See Maestri*, 860 F.2d at 52-53; *Green v. Maraio*, 722 F.2d 1013 (2d Cir. 1983); *Heimbach v. Village of Lyons*, 597 F.2d 344 (2d Cir. 1979) (per curiam). *Heimbach* grew out of the concerted effort by village officials, including a Village Justice of the Peace, to facilitate commercial development of a site occupied by low-income tenants. The Justice played his part by issuing a warrant for the arrest of Heimbach, one of the tenants, for a "supposed misdemeanor pursuant to a section of the State Building Construction Code which has no provision for criminal penalties, and, in particular, has no penalties applicable to a tenant such as . . . Heimbach." *Heimbach*, 597 F.2d at 346. *Heimbach* affirmed the district court's dismissal of the action against the Justice because he did have "jurisdiction over criminal matters under New York State law . . . and . . . the power to issue criminal warrants . . . ." *Id.* at 346. The Justice did not, in the words of *Bradley*, act in the " 'clear absence of all jurisdiction' " and thus was immune from liability on Heimbach's damage suit. *Id.* (quoting *Bradley*, 80 U.S. at 351). Likewise, in *Green v. Maraio*, 722 F.2d 1013 (2d Cir. 1983), the plaintiff alleged that a trial judge in a New York county court had altered a transcript in his case after it was completed and the judge no longer had jurisdiction. *Green* upheld the dismissal of plaintiff's case against the judge on the ground that while the judge may not have retained personal jurisdiction over the plaintiff and the completed case, he had subject matter jurisdiction, did not act in the clear absence of all jurisdiction, and was entitled to

immunity. Similarly, by operation of section 120.90(3), Justice Outwater enjoyed jurisdiction over bail and the power to enforce the conditions thereof with respect to persons arrested within her bailiwick.

This decision is also consistent with the judicial immunity jurisprudence of sister circuits. For example, in *O'Neil v. City of Lake Oswego*, 642 F.2d 367 (9th Cir. 1981), a state court judge convicted a woman of contempt without complying with "all the requirements of a statute conferring jurisdiction." *Id.* at 369. Contempt was a subject matter over which the judge had jurisdiction, however. The Ninth Circuit accorded him judicial immunity because he had ruled "on matters belonging to categories within the[ ] court's jurisdiction, even when [he had failed] to comport with procedural niceties necessary to give the court power over the particular matter." *Id.* at 370. Failure to comply with those procedural niceties is "the sort of 'grave procedural error' that does not pierce the cloak of immunity.' " *Id.* at 369; *see also Williams v. Sepe*, 487 F.2d 913 (5th Cir. 1973) (per curiam) (providing immunity in face of failure to comply with the procedure for prosecuting an indirect contempt); *Robinson v. McCorkle*, 462 F.2d 111 (3d Cir. 1972) (providing immunity to judge who committed plaintiff to hospital pursuant to a repealed statute); *Jacobsen v. Schaefer*, 441 F.2d 127 (7th Cir. 1971) (providing immunity to county judge who abused his discretion by setting unlawful conditions to bail).

Likewise, in *Lopez v. Vanderwater*, 620 F.2d 1229 (7th Cir. 1980), the Seventh Circuit held that an Illinois circuit court judge who arraigned, convicted, and sentenced an accused without the assistance of a prosecutor, defense attorney, court reporter, or court clerk was entitled to judicial immunity from damages for that conduct,

even though the judge was not assigned to sit in that particular branch of the court. The judge was entitled to absolute immunity because he was "authorized by law to hear the kind of case in which he acted." *Id.* at 1234.

B. *Judicial Immunity in Courts of Limited Jurisdiction*

Although plaintiff did not raise the issue, we are constrained to note that there is Supreme Court dictum to the effect that judges who sit on courts of limited (as opposed to general) jurisdiction are immune from damages only if they act within their jurisdiction, and are subject to damage actions if they act in excess, although not in the clear absence, of all jurisdiction. *See Alzua v. Johnson*, 231 U.S. 106 (1913); *Bradley*, 80 U.S. at 351; *Randall v. Brigham*, 74 U.S. (7 Wall.) 523, 535-36 (1869). Two relatively recent Eighth and Tenth Circuit cases have endorsed, without discussion, these Supreme Court statements. *See McClain v. Brown*, 587 F.2d 389, 390 (8th Cir. 1978) (noting that judges of courts of limited jurisdiction are entitled to immunity for judicial acts performed within their jurisdiction, but not for actions in excess of their jurisdiction or, of course, in the clear absence of all jurisdiction); *Van Sickle v. Holloway*, 791 F.2d 1431, 1435 (10th Cir. 1986) (same).[3] However, immunity decisions of this Court have apparently assumed, without deciding, that local New York state judges of limited jurisdiction enjoy the same immunity

[3] *McClain*, inexplicably, does not cite previous Eighth Circuit decisions that accorded judges of courts of limited jurisdiction absolute immunity for all judicial acts not performed in the clear absence of all jurisdiction. *See Harley v. Oliver*, 539 F.2d 1143 (8th Cir. 1976) (holding that probate judge is entitled to absolute immunity for all judicial acts not performed in the clear absence of all jurisdiction); *Duba v. McIntyre*, 501 F.2d 590 (8th Cir. 1974) (holding that justice of the peace is entitled to absolute immunity for all judicial acts not performed in the clear absence of all jurisdiction).

accorded to judges of general jurisdiction. *See Maestri*, 860 F.2d at 53 (town justice is entitled to absolute immunity for judicial acts not performed in the clear absence of all jurisdiction); *Heimbach*, 597 F.2d at 346 (village justice is entitled to absolute immunity for judicial acts not performed in the clear absence of all jurisdiction). Indeed, the clear weight of authority, including that of the New York courts, has also applied the *Bradley* immunity principles to both categories of judges. *See Cok v. Cosentino*, 876 F.2d 1 (1st Cir. 1989); *Dykes v. Hosemann*, 776 F.2d 942 (11th Cir. 1985); *King v. Love*, 766 F.2d 962 (6th Cir. 1985); *Ammons v. Baldwin*, 705 F.2d 1445, 1447 (5th Cir. 1983); *O'Neil v. City of Lake Oswego*, 642 F.2d 367, 368 n.2 (9th Cir. 1981); *Lopez v. Vanderwater*, 620 F.2d 1229, 1234 (7th Cir. 1980); *Turner v. Raynes*, 611 F.2d 92 (5th Cir. 1980); *Gregory v. Thompson*, 500 F.2d 59, 62 (9th Cir. 1974); *Owen v. Kronheim*, 304 F.2d 957 (D.C. Cir. 1962); *Lombardoni v. Boccaccio*, 504 N.Y.S.2d 260 (N.Y. App. Div. 1986); *Sassower v. Finnerty*, 465 N.Y.S.2d 543 (N.Y. App. Div. 1983).

This issue was not raised in the district court or on appeal. Plaintiff has made no special showing of "manifest injustice" or "extraordinary need." *See Amalgamated Clothing*, 54 F.3d at 73. Therefore, it is assumed, without deciding, that at least in a section 1983 case, a judge of a court of limited jurisdiction is entitled, like a judge of a court of general jurisdiction, to judicial immunity for all judicial acts not performed in the clear absence of all jurisdiction.

C. *Attorneys Fees and Injunctive Relief*

The original complaint against the several defendants includes a prayer for attorney fees and "other relief."

There is authority for the proposition that judicial immunity does not shield a judge from responsibility for attorney fees sought by a prevailing party or from appropriate injunctive relief. *See Pulliam v. Allen*, 466 U.S. 522 (1984). On October 19, 1996, Congress limited the circumstances under which a plaintiff may obtain such relief. *See* 42 U.S.C. §§ 1983 & 1988, as amended by Pub. L. No. 104-317, Title III, § 309(c), Oct. 19, 1996, 110 Stat. 3853. This interlocutory appeal interrupted the opportunity of the district court to reach those issues. Therefore, it would be inappropriate at this time to address whether plaintiff may obtain such relief or whether Congress's 1996 amendments are applicable to this action.

III.

Conclusion

Accordingly, for the foregoing reasons, the judgment of the district court denying Justice Outwater's motion to dismiss is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

(2)

Supreme Court, U.S.
FILED
OCT 28 1997
CLERK

No. 97-554

In The

Supreme Court of the United States

October Term, 1996

JAMES E. TUCKER,

Petitioner,

vs.

MARILYN OUTWATER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioner James Tucker commenced this action pursuant to 42 U.S.C. § 1983 and the Fourteenth Amendment against two counties, several law enforcement officers, and Marilyn Outwater, a Town Justice in the Town of Watertown, Jefferson County, New York. Petitioner seeks damages and attorneys' fees for his alleged false arrest, malicious prosecution and illegal confinement.

Upon respondent Outwater's motion to dismiss, the United States District Court for the Northern District of New York (Hon. Thomas J. McAvoy, Chief USDJ) and, upon appeal, the Second Circuit Court of Appeals accepted the facts alleged in the complaint, petitioner's supporting affidavits and interrogatory answers, and reasonable inferences drawn therefrom in the light most favorable to the petitioner.

The complaint alleges that petitioner was arrested in his home in the early morning hours of March 18, 1994 for an alleged violation of New York Vehicle & Traffic Law § 1192(3) [driving while intoxicated], and § 1120(a) [failure to keep right]. The charges arose out of an accident that took place on December 4, 1993 in Yates County, New York. Petitioner alleges that he was a passenger in defendant VanAmburg's pick-up truck when VanAmburg lost control of the truck, causing it to strike a culvert causing injuries to the petitioner. When the police arrived at the scene, VanAmburg allegedly admitted that he was the driver and was issued uniform traffic tickets by the defendant Bradley Quayle of the Yates County Sheriff's Department. At some point between December 4, 1993 and March of 1994, however, the tickets issued to VanAmburg were dismissed and then issued to the petitioner as the alleged driver of the vehicle.

On March 16, 1994, Justice Duane Shay of the Town Court

of Italy, Yates County, issued a warrant for petitioner's arrest. On March 18, 1994 between 3:00 a.m. and 5:00 a.m. officers of the Yates and Jefferson County Sheriffs' Departments arrested petitioner at his home in the Town of Evans Mills in Jefferson County, and transported him to the Town of Watertown Justice Court, Marilyn Outwater, Town Justice, some 20 miles away from petitioner's residence. Yates County, on the other hand, is some 100 miles away from petitioner's home in Jefferson County.

Although Justice Shay's warrant for petitioner's arrest was extant, and the warrant of arrest and accompanying information and arrest report were faxed by the Yates County Sheriff's office to the Jefferson County Sheriff's office at approximately 3:51 a.m. on March 18, 1994, petitioner contends that neither the arresting sheriffs nor the Town Justice were in possession of the warrant at the time of his arrest. Petitioner further alleges that Justice Outwater proceeded to arraign him and refused to give him a warrant, summons, uniform traffic ticket, affidavit, or any other documents supporting his arrest, and proceeded to set bail in the sum of $800 (as requested in the Yates County Sheriff's faxed transmission enclosing the warrant). A week later, petitioner was again brought before Justice Outwater, and was furnished with illegible copies of DWI tickets. Thereafter, petitioner was released, and on March 4, 1995 was found not guilty by a jury in the Town of Italy, Yates County.

Petitioner commenced this action under § 1983 and the Fourteenth Amendment, alleging that the defendants conspired to cause the deprivation of his civil rights, his false arrest, imprisonment and malicious prosecution. Petitioner maintained that the respondent Outwater "committed extra-judicial acts in violation of his civil rights and may not therefore avail herself of the defense of absolute judicial immunity"; that Justice Outwater conspired with the other defendants to have petitioner

arraigned in the middle of the night; arraigned him without a warrant or accusatory instrument; abused her discretion in setting bail; and ignored the New York statutory requirement that the arrest warrant had to be endorsed by a local criminal court of Jefferson County, since he was arrested in neither the county in which the arrest warrant was returnable, Yates County, nor another county that adjoins Yates County (New York Criminal Procedure Law § 120.90(3)).[1]

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1. § 120.90(3) provides in relevant part:

> Upon arresting a defendant for an offense other than a felony pursuant to a warrant of arrest in a county other than the one in which the warrant is returnable or one adjoining it, a police officer or peace officer . . . if he be one to whom the warrant is addressed must inform the defendant that he has a right to appear before a local criminal court of the *county of arrest* for the purpose of being released on his own recognizance or having bail fixed. If the defendant does not desire to avail himself of such right, the officer must request him to endorse such fact upon the warrant, and upon such endorsement the officer must without unnecessary delay bring him before *the court in which the warrant is returnable*. If the defendant does desire to avail himself of such right, or if he refuses to make the aforementioned endorsement, the officer must without unnecessary delay bring him before *a local criminal court of the county of arrest*. Such court must release the defendant on his own recognizance or *fix bail* for his appearance on a specified date *in the court in which the warrant is returnable*. If the defendant is in default of bail, the officer must without unnecessary delay bring him before *the court in which the warrant is returnable*.

(Emphasis added).

Justice Outwater moved to dismiss on the ground of judicial immunity. Justice Outwater conceded that the arrest warrant issued for the petitioner was not endorsed by a local criminal court as provided by the statute, but that the absence of that endorsement did not mean that she had no jurisdiction over the subject matter of petitioner's arraignment. Rather, Justice Outwater was specifically granted the power to arraign the petitioner and fix bail pursuant to Criminal Procedure Law § 120.90(3), and any alleged failure on her part to see to it that the defendant police officers complied with the notice provision of the statute, while a procedural error, did not divest her of subject matter jurisdiction over the misdemeanor charge. By allegedly failing to enforce full compliance with the statute, she may have acted in excess of her jurisdiction by proceeding without proper jurisdiction over petitioner's person, but did not act in the clear absence of all jurisdiction.

The District Court, relying upon *Maestri v. Jutkofsky*, 860 F.2d 50 (2d Cir. 1988), denied the motion to dismiss, concluding that Justice Outwater could not rely on CPL § 120.90(3) to support subject matter jurisdiction over petitioner's arraignment since the arrest warrant was not endorsed by a local criminal court, and that even if the arrest warrant was in the court's possession, it was not provided to the petitioner, thereby depriving him of a choice of arraignment forums. Judge McAvoy concluded that a reasonable judge would have known that, by failing to give Tucker the option of arraignment forums, the statute was not complied with, and Justice Outwater must have so known. Accordingly, the court concluded that Justice Outwater acted in clear absence of jurisdiction because she assumed authority outside the geographic bounds of her office.

Justice Outwater appealed the District Court's denial of her motion to dismiss. The Second Circuit Court of Appeals reversed, unanimously holding in a lengthy and well-reasoned

opinion that Justice Outwater is entitled to absolute immunity from damages by virtue of possessing subject matter jurisdiction over the preliminary proceedings that she conducted pursuant to § 120.90(3) of the New York Criminal Procedure Law. *Tucker v. Outwater*, 118 F.3d 930 (July 7, 1997).

Because the complaint included a prayer for attorneys fees and "other relief", the right to which was not addressed by the District Court prior to respondent's interlocutory appeal, the Court of Appeals remanded the case for further proceedings. To date, the petitioner has not pursued such other relief in the District Court.

REASONS FOR DENYING THE WRIT

As noted in the rules of this Court, a petition for writ of certiorari will be granted only for compelling reasons. Supreme Court Rule 10; *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70. In considering a petition arising from a decision of a Circuit Court of Appeals, this Court will consider whether or not the lower court has entered a decision in conflict with the decision of another Court of Appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctions such a departure by a lower court, as to call for an exercise of this Court's supervisory power (Rule 10(a)). The Court further will consider whether the Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this court (Rule 10(c)).

Petitioner has failed to satisfy any such basis warranting this Court's exercise of its discretion in this case.

The opinion of the Second Circuit in the instant case sets forth a well-reasoned and comprehensive analysis of the law of judicial immunity from the seventeenth century to the present. In determining that Justice Outwater did not act in the complete absence of jurisdiction when she arraigned petitioner and fixed and enforced his bail, all as authorized by New York Criminal Procedure Law § 120.90(3), (*Tucker*, 118 F.3d at 935), the Second Circuit discussed and relied on the judicial immunity jurisprudence established by this court in *Bradley v. Fisher*, 80 U.S. (13 Wall) 335 and *Stump v. Sparkman*, 435 U.S. 349. The court correctly concluded that Justice Outwater was entitled to judicial immunity notwithstanding the alleged imperfect exercise of the particulars of her jurisdiction during the arraignment. The court properly noted that although Justice Outwater may have acted in excess of her jurisdiction, her failure to endorse the warrant or advise Tucker of his right to be arraigned in Yates County, while procedural errors, did not deprive her of subject matter jurisdiction of the arraignment conferred by state statute.

In so concluding, the Second Circuit distinguished and harmonized its prior decision in *Maestri v. Jutkofsky*, 860 F.2d 50 (1988), in which the judicial immunity defense was rejected because of the defendant Town Justice's issuance of a warrant of arrest for the plaintiffs in the clear absence of all jurisdiction of that court. In contrast, in the instant case "it cannot be said consistently with Supreme Court jurisprudence that "jurisdiction is clearly absent" where, as here, "jurisdiction over the subject-matter is invested by law in the judge." (*Tucker, supra* at 936 citing *Stump*, 435 U.S. at 356 n.6).

Furthermore, the Second Circuit found its decision in the instant case to be consistent with not only its own earlier immunity rulings (*e.g. Maestri, supra*; *Greene v. Maraio*, 722 F.2d 1013 (2d Cir. 1983) and *Heimbach v. Village of Lyons*, 597 F.2d 344 (2d Cir. 1979), but with the judicial immunity

jurisprudence of sister circuits, including the Ninth Circuit (*O'Neil v. City of Lake Oswego*, 642 F.2d 367 (1981)), the Fifth Circuit (*Williams v. Sepe*, 487 F.2d 913 (1973)), the Third Circuit (*Robinson v. McCorkle*, 462 F.2d 111 (1972)), and the Seventh Circuit (*Jacobsen v. Schaefer*, 441 F.2d 127 (1971) and *Lopez v. Vanderwater*, 620 F.2d 1229 (1980)).

Thus, it is clear that the decision in this case in not in conflict with the decision of another United States Court of Appeals on the same matter, nor does it conflict with a decision of a state court of last resort, nor has it so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. Furthermore, the question of law decided by the court below has been settled by this Court, and was not decided in a way that conflicts with relevant decisions of this Court. Petitioner's petition for review, at best, argues that the Second Circuit misapplied a properly stated rule of law: respondent disagrees, but even assuming so for purposes of argument, that fact is not generally sufficient for the grant of a petition for writ of certiorari (*see* Rule 10 of the Rules of the Supreme Court).

Finally, inasmuch as the Second Circuit reversed and remanded the case for further proceedings in light of petitioner's prayer for attorneys' fees and "other relief" in his complaint, this matter has not yet been finally concluded as to Justice Outwater, and in the absence of a final resolution of petitioner's claim against her is not final and should not be reviewed by this Court. *See Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912.

CONCLUSION

No compelling reason for a grant of a writ of certiorari has been shown by the petitioner. The Second Circuit Court of Appeals correctly applied the settled law of judicial immunity to petitioner's factual allegations, and properly concluded that Justice Outwater did not act in the clear absence of all jurisdiction by arraigning the petitioner pursuant to the subject matter jurisdiction expressly conferred by the New York Criminal Procedure Law.

Accordingly, petitioner's petition for writ of certiorari should be denied.

Respectfully submitted,

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